

June 20, 2006

**REPORT AND RECOMMENDATIONS OF THE
JUDICIAL COMPENSATION COMMITTEE**

Submitted to: The Minister of Justice and Attorney General
 for the Province of Manitoba

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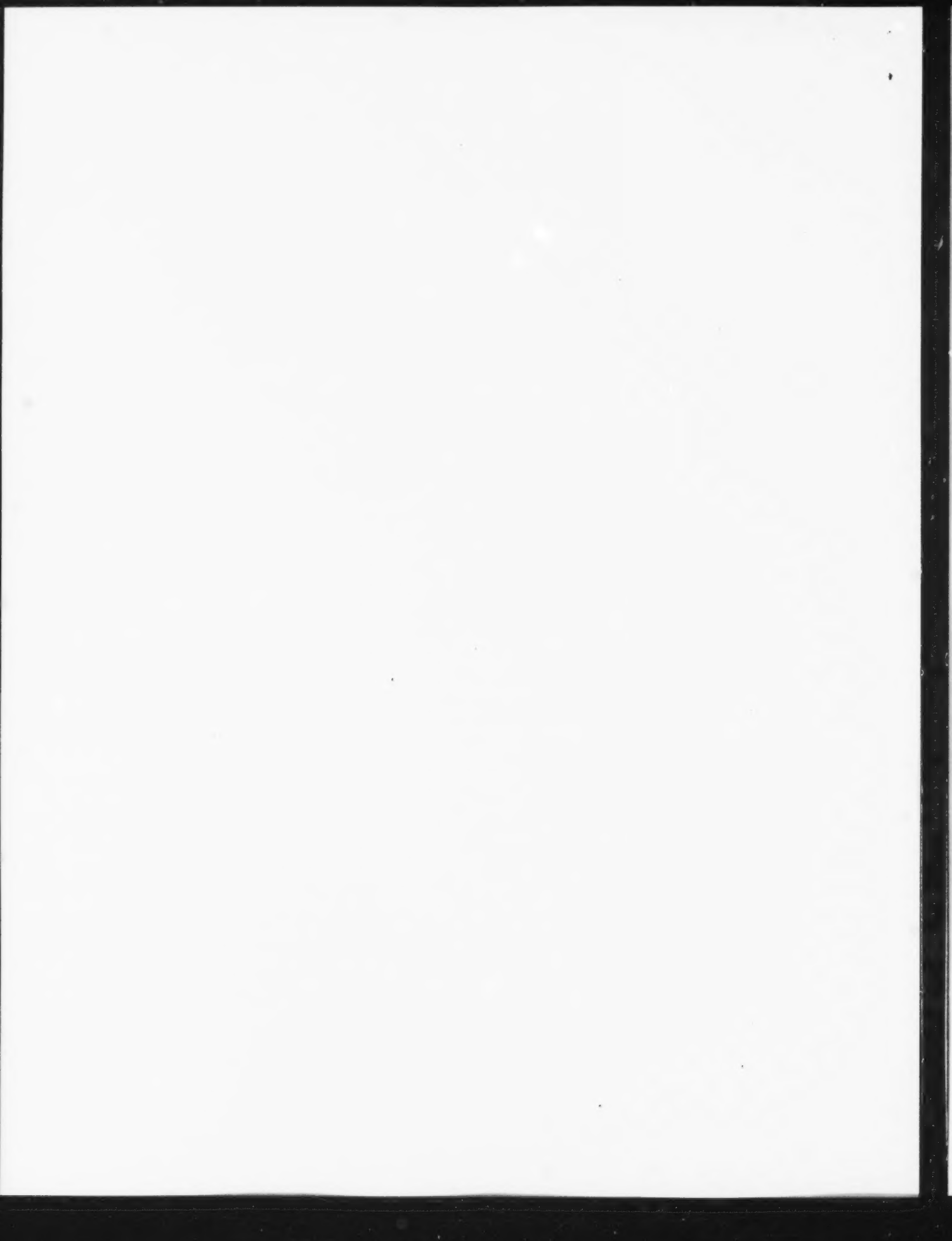


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1. Background/Context

1.1 Previous JCCs

This is the sixth report of a JCC in Manitoba. The first committee, chaired by Mr. Donald Baizley, Q.C., was appointed in August 8, 1990 and delivered its report on June 7, 1991. It recommended salary increases as of January 1, 1990 from \$88,607.00 to \$91,000.00, to \$93,000.00 effective August 1, 1990, and to \$95,520.00 effective January 1, 1991. It also recommended pensions approximately equal to an average of benefits available in Nova Scotia, New Brunswick and Saskatchewan.

The government implemented a 3% salary increase to \$91,274.00 effective September 1, 1991, and effective July 1, 1992 a supplemental pension plan was established.

JCC #2 and #3 were both chaired by Mr. John Green. JCC #2 was appointed October 1992 and reported December 29, 1995. The reduced work week legislation was operational from April 1, 1993 to March 31, 1995. As a result, salaries were reduced 3.8% to \$90,444.00. As a result of the legislation, a court challenge was launched which ultimately ended up in the Supreme Court of Canada. JCC #2 recommended salary increases of 2.3% (\$96,180.00) effective September 1, 1993, and 0.9% (\$97,022.00) effective September 1, 1994. It also recommended the

supplementary pension benefit be extended to cover judicial service prior to July 1, 1992.

The government implemented a salary increase of 2.3% to \$96,173.00 effective April 1, 1995. There were not any changes made to the pension.

JCC #3 was appointed January 1997 and reported June 22, 1998. The aforementioned Supreme Court decision was handed down September 18, 1997 and will be the subject of comment in this report. JCC #3 recommended salary increases to \$105,000.00 effective April 1, 1997 and \$112,000.00 effective April, 1998. It also recommended that the supplemental benefit in the pension plan be extended to cover service prior to July 1, 1992 and made recommendations on parking, professional allowance and costs.

The government implemented salary increases only. The government's decision was challenged in the Court of Queen's Bench. Mr. Justice Scott Wright ordered on July 27, 2001 that JCC #3's recommendations about pension, professional allowances, and costs be implemented effective April 1, 1999.

JCC #4 was chaired by Mr. Martin Freedman, Q.C. as he was then known. JCC #4 was appointed February 2001 and reported April 19, 2002. The majority salary recommendations were \$122,000.00 effective April 1, 1999, \$133,000.00 effective April 1, 2000, and \$144,000.00 effective April 1, 2001. For pension changes, it

recommended a spousal benefit without reduction and a reduction from five years to three years for the averaging calculation.

JCC #4 also recommended that Masters should receive a lump sum payment of \$2,500.00 for each fiscal year of service from March 31, 1989 to April 1, 1999. The government implemented all the recommendations except the one concerning the Masters.

JCC #5 chaired by Michael Werier reported March 15, 2003. Based on the actual salaries being paid to judges in Saskatchewan, Nova Scotia and New Brunswick as at April 1, 2003, JCC #5 certified the three province average was \$149,032.67, for Associate Chief Judge \$159,032.67, and Chief Judge \$164,032.67.

JCC #5 recommended a salary of \$152,000.00 for 2002, \$156,560.00 for 2003, and \$161,256.80 for 2004. It was recommended that the Associate Chief Judge and Chief Judge salaries be \$5,000.00 and \$10,000.00 higher respectively.

In addition, JCC #5 recommended that the Manitoba Plan dealing with Judges' pensions be amended to allow a full pension after 23.5 years requiring an accrual rate of 3.0%.

The legislature implemented JCC #5's recommendations on salary and that the Manitoba Plan be amended to allow a full pension after 23.5 years requiring an annual accrual rate of 3%.

The changes to the pension plan as a result of JCC #5 had the following financial impact:

(1)	Increase in accrued liability (one time)	\$5,441,371.00
(2)	Annual service cost	\$ 558,805.00
(3)	Interest cost	\$ 360,055.00

1.2 Supreme Court of Canada Decisions

Two Supreme Court decisions require comment and provide guidance to this committee. The Supreme Court ruling in *Reference to Remuneration of the Judges of the Provincial Court of Prince Edward Island; R v. Campbell; R v Wickman; Manitoba Provincial Judges Association v. Manitoba (Minister of Justice)*, [1997] 3 S.C.R. 3 was a landmark decision. The Court stated that judicial independence is constitutionally protected. Compensation must be at a level that protects judicial independence. The Supreme Court stated that the provincial government cannot negotiate directly with the Judges and an independent body must be set up to make recommendations to government.

The Court confirmed that Judges are not civil servants, but a branch of government. Judicial independence has three core characteristics: security of tenure, financial security, and administrative independence.

At p.193 of the *Judges Reference*, Chief Justice Lamer wrote:

I want to make it very clear that the guarantee of a minimum salary is not meant for the benefit of the judiciary. Rather, financial security is a means to the end of judicial independence, and is therefore for the benefit of the public. As Professor Friedland has put it, speaking as a concerned citizen, it is "for our sake, not for theirs" (p.56)

In its recently released decision (July 22, 2005), the Supreme Court had the opportunity to again consider the issue of judicial independence in the context of the compensation commission process. The decision warrants careful scrutiny so that this commission carries out its function in accordance with the principles set out by the Court.

Three of the cases involved appeals from the judges (New Brunswick, Ontario and Alberta), and one by the Attorney General and Minister of Justice in Quebec.

The headnote in the case sets out the history of the proceedings and is reproduced here:

In New Brunswick, a Commission established under the *Provincial Court Act* recommended increasing the salary of Provincial Court judges from \$142,000 in 2000 to approximately \$169,000 in 2003. The Government rejected this recommendation, arguing (1) that the Commission had misunderstood its mandate; (2) that it was inappropriate to link the Provincial Court judges' salary to that of federally appointed judges; and (3) that the judges' existing salary was adequate. The appellant Association applied for judicial review of the Government's response, and the Government successfully applied to have four affidavits admitted into evidence. On the salary issue, the reviewing judge found the Government's reasons for rejecting the Commission's recommendation to be rational. The Court of Appeal reversed

the reviewing judge's decision on the admissibility of the affidavits, but upheld his decision on the salary issue.

In Ontario, the remuneration Commission made a binding recommendation that a salary increase of approximately 28 percent over three years be awarded and also made certain optional pension recommendations. Ontario retained an accounting firm to determine the cost of the pension options and subsequently refused to adopt any of the pension recommendations, listing several reasons, including: (1) that the 28 percent salary increase, which had automatically increased the value of the pension by 28 percent, was appropriate; (2) that no significant demographic changes had occurred since the 1991 review of the pension plan; and (3) that the Government's current fiscal responsibilities required a continued commitment to fiscal restraint. The judges applied for judicial review. In support of its position, Ontario filed affidavits from the accounting firm and they were held to be admissible. The Divisional Court dismissed the application, holding that Ontario's reasons for rejecting the pension recommendations were clear, logical and relevant. The Court of Appeal upheld the decision.

In Alberta, the compensation Commission issued a report recommending, among other things, a substantial increase in salary for Justices of the Peace. Although Alberta accepted that salaries and per diem rates ought to be increased, it rejected the specific increases recommended by the Commission and proposed a modified amount. Alberta's reasons stressed that it had a duty to manage public resources and act in a fiscally responsible manner, and that the overall level of increase recommended was greater than that of other publicly funded programs and significantly exceeded those of individuals in comparative groups. The Court of Queen's Bench allowed the respondents' application challenging the constitutionality of the changes, holding that Alberta's reasons for rejecting the Commission's recommendations did not pass the test of simple rationality. The Court of Appeal upheld the decision.

In Quebec, the judicial compensation Committee established under the *Courts of Justice Act* recommended raising the salary of judges in the Court of Quebec from \$137,000 to \$180,000 and adjusting their pension. The report also recommended eliminating the salary parity of municipal court judges in Laval, Montreal and Quebec City with judges of the Court of Quebec and suggested a lower pay scale. A second panel of the Committee addressed the compensation of judges of the municipal courts to which the *Act respecting municipal courts* applies - namely, the judges of the municipal courts outside Laval, Montreal and Quebec City - and, on the assumption that parity should be abandoned, set the fee schedule at a scale reflecting responsibilities less onerous than those of full-time judges. In its response, the Government proposed that the most important recommendations be rejected. It limited the initial salary increase of judges of the Court of Quebec to 8 percent, with small additional increases in 2002 and 2003. The response

accepted the elimination of parity for municipal judges, limited the raise in their salaries to 4 percent in 2001 and granted them the same adjustments as judges of the Court of Quebec in 2002 and 2003. It accordingly adjusted the fees payable to judges of municipal courts to which the *Act respecting municipal courts* applies rather than accepting the fee scales recommended by the Committee. The Conference des juges du Quebec, which represents the judges of the Court of Quebec and the judges of the municipal courts of Laval, Montreal and Quebec City, challenged the Government's response in court. Both the Superior Court and the Court of Appeal held that the response did not meet the test of rationality. The Conference des juges municipaux du Quebec, which represents municipal court judges outside Laval, Montreal and Quebec City and which had not challenged the Government's response, was denied leave to intervene in the Court of Appeal.

The appeals by the judges were dismissed by the Supreme Court in the New Brunswick and Ontario cases, and allowed in Alberta. The appeal of the Attorney General and Minister of Justice of Quebec was dismissed, and the matter remitted back to the Government of Quebec and the National Assembly.

At the outset the Court confirmed that the principles stated in the Reference remain valid, but stated that while the compensation process is working satisfactorily in some provinces, in others it has resulted in litigation. Therefore, the Supreme Court stated that the principles in the Reference must be clarified.

The following were among the principles set out by the Supreme Court:

- (1) The focus of the compensation process is on identifying the appropriate level of remuneration.

- (2) The reports of previous commissions and their outcomes form part of the background and context that a new compensation committee should consider. A new commission may very well decide that, in the circumstances, its predecessors conducted a thorough review of judicial compensation and that, in the absence of demonstrated change, only minor adjustments are necessary. If on the other hand, it considers that previous reports failed to set compensation and benefits at the appropriate level due to particular circumstances, the new commission may legitimately go beyond the findings of the previous commission, and after careful review, make its own recommendations on that basis.
- (3) The commission must objectively consider the submissions of all parties and any relevant factors identified in the enabling statute and regulations. Its recommendations must result from a fair and objective hearing. Its report must explain and justify its position.
- (4) A commission's report is consultative. The government may turn it into something more. Unless the legislature provides that the report is binding, the government retains the power to depart from the commission's recommendations as long as it justifies its decision with rational reasons. These rational reasons must be included in the government's response to the commission's recommendations.

- (5) The government can reject or vary the commission's recommendations, provided that legitimate reasons are given. Reasons that are complete and that deal with the commission's recommendations in a meaningful way will meet the standard of rationality. Legitimate reasons must be compatible with the common law and the Constitution. The government must deal with the issues at stake in good faith. Bald expressions of rejection or disapproval are inadequate.
- (6) The government's reasons for departing from the commission's recommendations, and the factual foundations that underlie those reasons, must be clearly and fully stated in the government's response to the recommendations. If it is called upon to justify its decision in a court of law, the government may not advance reasons other than those mentioned in its response, though it may provide more detailed information with regard to the factual foundation it has relied upon, as will be explained below.
- (7) A commission must look at and consider all the factors set out in *The Provincial Court Act*. The commission's report should explain how various factors set out in the *Act* have been considered, and also address both parties' submissions.
- (8) The Reference did not make salary increases mandatory.

- (9) A subsequent commission may reconsider an earlier commission's findings or recommendations when conducting its own review.
- (10) If government is going to reject the commission's findings and meet the test of "rationality" it must respect the commission by answering certain key justifications for the recommendations instead of merely restating its original position.
- (11) A reviewing court is not asked to determine the adequacy of judicial remuneration but must focus on the government's response and on whether the purpose of the process has been achieved. This is a deferential review which acknowledges both the government's unique position and accumulated experience and its constitutional responsibility for management of the province's financial affairs.
- (12) The court added a third stage to the two articulated in the 1997 case requiring a reviewing court to consider a government's response from a global perspective, and even if it may find fault with some particular responses or lack of answer, must weigh and assess the government's participation in the process and its response in order to determine whether the response, viewed in its entirety, is impermissibly flawed even after the proper degree of deference is shown to the government's opinion on the issues. The focus shifts to the totality of the process and of the response, a significant change from the 1997 reference.

Also, the Supreme Court's decision had the effect of requiring Provincial Court judges in New Brunswick to receive the lower salary level (based on the 2003 figures set by an earlier JCC and until the 2004-2007 JCC is convened in New Brunswick and provides its report. The Supreme Court decision also allowed the Province of Alberta to claw back the salary of \$220,000.00 to \$200,000.00 based on the province's rational and justified conclusion that the salary be limited to \$200,000.00. The Government of Quebec was given the opportunity to provide justifiable and rational reasons for its rejection of its commission's report. In Ontario, the Judges' appeal was dismissed.

This commission has taken into account the principles enunciated by the Supreme Court in the preparation of this report and recommendations.

2. Introduction

2.1 The Provincial Court Act

Effective April 1, 2002, new provisions were introduced into *The Provincial Court Act* RSM 1987, c. C275 ("the Act"). The changes were significant.

The major legislative provisions are as follows:

1. A Judicial Compensation Committee ("JCC") is to be appointed on or before April 1, 2002 and on or before April 1 in every third year after 2002.
2. The mandate of the JCC is to investigate, report and make recommendations with respect to salaries and benefits to be paid to Provincial Court Judges, including the Chief Judge and Associate Chief Judge(s).
3. The report of the JCC is to make recommendations for the fiscal year that begins on April 1 in the year in which the Committee is appointed.
4. The report must set out information as to salaries paid to judges on April 1 of the year in which the Committee is appointed, including salaries for the Chief Judge, Associate Chief Judge, and the Judges of the Courts of New Brunswick, Nova Scotia and Saskatchewan, and also the designated average for the Chief Judge, Associate Chief Judge and Judges. The designated average is the average of the three annual salaries of the Three Provinces being paid on April 1 of the year the JCC is appointed.
5. For purposes of recommending compensation, the JCC is required to consider the following factors which are set out in s.11.1(16):
 - (a) the nature of the judges' role and the independence of the judiciary;
 - (b) the need to attract and retain excellent applicants to the judiciary and the statistics with respect to the recruitment, retention, resignation and retirement of judges;

- (c) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Manitoba and the overall economic and financial state of the Manitoba economy;
 - (d) the principle that public resources must be managed efficiently and effectively in the context of the government's current financial position;
 - (e) the cost of living and the growth or decline in real per capita income in Manitoba;
 - (f) the manner in which the compensation package paid to judges in Manitoba compares to judicial compensation packages in other jurisdictions in Canada, having regard to the differences between jurisdictions.
6. Certain salary recommendations are binding if they are equal to or less than, for the particular year, the designated salaries for the Judges in Nova Scotia, New Brunswick and Saskatchewan.
7. The report of a JCC is to be provided to the Minister, Chief Judge, the Associate Chief Judge(s), and the Judges of the Court. The report is confidential until tabled in the Legislature. Within seven (7) days after the report is submitted, any of the above parties may request clarification of all or some of the report and the clarification must be provided within fifteen (15) days after the request is made. The report is not considered to be submitted until the clarification is made.

8. The Minister is to table the report within fifteen (15) days if the Assembly is sitting, or if it is not, within fifteen (15) days after it is sitting. As mentioned earlier, certain salary recommendations are binding on the government and the judges. The matter is referred to a Standing Committee which reports to the Assembly which ultimately receives and votes on the report. The Standing Committee may accept or reject one or more of the recommendations and must provide reasons for each recommendation rejected.
9. On July 6, 2001, Bill 46 amended *The Court of Queen's Bench Act* to provide that Masters receive the same total compensation package as Provincial Court Judges.

2.2 Order in Council

The *Act* stipulates that a JCC is appointed by the Lieutenant Governor In Council. The JCC consists of one person designated by the Minister, one person designated by the Judges of the court, and one person who shall act as Chairperson, designated by the two parties. The Minister's designate is Victor Schroeder, Q.C., the Judges' designate is Barry Gorlick, Q.C., and the Chairperson of the committee is Michael Werier. The JCC was formally appointed by Order In Council 79/2005.

3. Decision of the Nova Scotia Compensation Committee

Also of relevance is the decision from the Nova Scotia Committee on compensation.

The Nova Scotia report stated that there are relevant reasons for excluding certain calculations from the calculation of national averages (for example Alberta and Ontario along with the Yukon and North West Territories) while paying particular attention to the Atlantic provinces and, for that matter, Manitoba. It is also noteworthy that the average of the salaries recommended by compensation commissions for those "smaller" jurisdictions is \$172,500.00.

Economic conditions within Nova Scotia do appear to be essentially on par with those in Manitoba. There is the question of the rather extraordinary debt load and debt service responsibilities that Nova Scotia carries, but it was acknowledged that there have been significant increases in federal-provincial transfers to Nova Scotia in the health care and off shore petroleum contexts along with a balanced budget for the past three years. Not unlike the situation in this Province, the Government's brief in Nova Scotia did strike a much more cautious tone and focused directly upon the fact that Nova Scotia continues to have one of the highest debt levels in the country and the second highest net direct debt to GDP ratio in the country. There are other factors which left the government of Nova Scotia to assert that all it could afford was a cost of living increase to the current judicial salaries which were then starting at \$163,342.00 for the year 2004.

Of particular interest was the fact that in 2002, Nova Scotia judges received a salary increase to \$157,000.00 with corresponding 2% inflationary increases in each year thereafter with the result that by 2004 the total salary being paid was \$163,342.00. It is also noteworthy that the 2% inflationary increases did not keep step with either CPI or IAI increases in that province.

In the result, the Nova Scotia tribunal awarded the judges a salary of \$172,000.00 commencing April 1, 2005 with annual increases for the two subsequent years of 2.5% resulting in a recommended salary for April 1, 2006 of \$176,300.00 and a recommended salary for April 1, 2007, of \$180,708.00.

Nova Scotia's legislation differs from ours in the following significant aspect:

1. Its decisions are binding on government, unlike ours, which are only binding for salaries (not benefits) less than the three province average.

Its legislation specifically mandates the Commission to take into consideration federal judicial compensation. There is a difference of opinion between the Judges and the Government in Manitoba as to the impact of federal compensation. Past JCCs have considered federal judicial compensation in their overall assessment.

4. Report of the Saskatchewan Provincial Court Commission

The above report was released on January 11, 2006 just prior to the finalization of this report. The Commission's report is a recommendation to the Saskatchewan

legislature. *The Provincial Court Act, 1998* does not list the factors to be taken into account by the Commission. It does however make reference to a "national average". This is defined as:

the average of the salaries paid to judges of provincial court or territorial court of the other provinces and territories of Canada, calculated as of the most recent occurrence of January 1st.

The Saskatchewan Act provides that in the event a Commission's advice to government is not acceptable, the Minister may:

where the report recommends a salary that is higher than the national average, fix a salary, in a manner that meets constitutional tests of judicial independence and in an amount that is not less than the national average, that is to be substituted for the salary recommended in the report [Act, paragraph 45(1)(b)(ii)]

In the final analysis, the Commission calculated the simple national average to be \$194,511.00 and rounded it off to \$195,000.00. The Commission recommended the base salary for judges be set at \$195,000.00 for April 1, 2006 to March 31, 2007, and the increases in the Saskatchewan Consumer Price Index for the succeeding two years.

The government of Saskatchewan had argued that no significant changes had occurred to either the provincial economy or to other public sector salaries in Saskatchewan since the previous commission but the commission found as a fact that since the previous commission.

The economic performance in Saskatchewan has been strong. Specifically, the province has reached a level of economic performance such that it no longer receives equalization payments from the federal government. Further, there has recently been a significant increase in the salaries paid to Deputy Ministers in Saskatchewan.

In addition, there had been a substantial change to the provincial judges' work load. It was under these conditions that the commission determined that the Canadian average was appropriate.

5. **Position of the Provincial Court Judges' Association
on Statutory Criteria**

The Judges emphasized that factor "f" in Section 11.1(16)(a) should be treated as the most significant of the enumerated factors. The Judges adopted the language of JCC #4 concerning the importance and relevance of compensation received by judges in other jurisdictions.

The Judges underscored the importance of subparagraph (f) by treating subparagraph (a) as a factor that recognizes the uniqueness of judges and supports the view that compensation of judges in Manitoba is best compared with the compensation of other judges.

The judges asserted that subparagraph (b) required emphasis to be placed on excellence of candidates and not on the statistics. The judges felt that the bare statistics relative to numbers of applicants for each vacancy and overall were not terribly helpful without further information about the applicants themselves.

The Judges addressed the issue of recruitment and the fact that in the Provincial Court, a wide majority of appointees were from government (in one form or another) while in Manitoba only 25% of the general population of lawyers are from government. It should be noted here that the Province challenged any valid conclusions that might be drawn from that reality and asserted rather compellingly that given the work of Provincial Court judges, it would be neither unexpected nor surprising for the vast majority of applicants to have background as crown attorneys, and particularly when compared to the workload of General Division Queen's Bench judges, where the expectation would be that private practitioners with a general litigation background or a background unrelated to the criminal law would more likely be expected to seek out those positions.

One aspect of the Judges' assertions related to the question whether, as a general proposition, lawyers in private practice earn more or even much more than lawyers employed by government or for that matter, by Provincial Court judges at their current compensation level. It is noteworthy that the Province introduced some actual data relative to this question and the best that can be said, based on the evidence that was produced, was that it really does remain an open question as to whether lawyers in the "preferred" age bracket of 46 to 55 years of age find

themselves with "real" income that is any greater than the compensation presently being paid to Provincial Court judges, and particularly when allowance is made for the pension benefits which judges enjoy (acknowledged by the Judges and the Province to have a present value of anywhere between \$1 and \$1.5 million and a value at the time of appointment of \$1.2 million).

On the question of "weighting" of factors (a) to (f), the Judges challenged the Province's position that there should be no priority or preference given to any one factor and reminded us that both JCC #4 and JCC #5 commented that factor (f), being the comparison of compensation paid to judges in other jurisdictions, was "a most relevant factor" and was most easily capable of empirical analysis based on either actual numbers or, at minimum, best estimates of numbers that either might be awarded by certain of the JCCs or following the then pending decision of the Supreme Court of Canada in relation to four of the jurisdictions.

The Judges also reminded us that although the Province argued that the three province average ought to be given significant weight and might even be used as a form of benchmark, the obligation of our JCC to certify the three province average did not change the fact that that average was not contained within the list of factors in Section 11.1(16). The Judges therefore argued that the three province average should not unduly influence our analysis of salary to be paid to the Judges for the years in question.

As to subparagraph (c), the Judges asserted that essentially the economy in

Manitoba is strong and that Manitoba ranks either in the mid range or closer to the front in many indicator areas. The Judges also emphasized that these strong economic factors and trends are not inconsistent with the other factors. In fact, the Judges felt that a strong economy points us more in the direction of a national average, whereas the Province suggested before JCCs #4 and #5, and again before us, that more of a "made in Manitoba" approach should be followed.

It was suggested by the committee that neither the Judges nor the Province addressed Manitoba's fiscal capacity, linked as it is to the 30 to 40 factors that are analyzed when the federal government considers equalization entitlements. Counsel for the Judges countered with the assertion that the governing legislation does not actually refer to ability to pay nor is any similar phrase incorporated into the governing provisions. It was submitted that the Judges were not suggesting that their salary should be on a par with the Province of Ontario or the federal government; rather the assertion was simply being made that we should consider a national average and develop a salary for Manitoba judges that was fair and reasonable in the circumstances.

The Judges also resisted any suggestion on the part of the Province, made before prior JCCs and again before this one, that there was any validity to the "ripple effect" argument. In short, the Judges took a firm position that Judges' salaries are not relevant in setting civil servants' salaries and there can be no argument based on a "ripple effect".

As to subparagraph (d) the point was made that implementing salary increases should not mean that there was resulting inefficient or ineffective management of public resources. In other words, the government does not have a lock on what constitutes management of its resources and there would be wide disagreement as to what might constitute effective management of public resources.

As to subparagraph (e) we were directed to the information provided by the Province relating to the Consumer Price Index for Manitoba. Manitoba ranks sixth among the provinces overall and ahead of Saskatchewan and New Brunswick and only slightly behind Nova Scotia in terms of real personal income per capita in each of the last four years (2001 - 2004). We were also provided Statistics Canada tables and a guide to utilizing those tables.

For the years 2000, 2001, 2002, 2003 and 2004, Statistics Canada recorded CPI changes of 2.5, 2.6, 1.6, 1.8 and 2.0 respectively. The four major chartered financial institutions confirmed that for the year 2004 Manitoba's consumer price index increase was 2.0, which was slightly above the national average of 1.8. Manitoba's CPI increase was slightly lower than Saskatchewan (at 2.2), but was higher than both New Brunswick and Nova Scotia (at 1.45 and 1.8 respectively). Finally, CPI indexes forecast for the years 2005 and 2006 by the same four major financial institutions showed Manitoba ranging from a low of 1.5 to a high of 2.3. No predictions were available for the year 2007.

The Judges also presented a large volume of statistical information concerning the state of the Manitoba economy. Overall, the Judges asserted that our economy was strong, diversified and insulated from key risks. We were reminded that JCC #4 found that Manitoba ranked anywhere between fifth and ninth among the provinces in terms of economic strength.

We were also reminded that JCC #5 concluded that Manitoba was at or near the "median" in terms of income and expenses. The Judges stated that Manitoba was either at the middle of the pack or perhaps leading relative to the key economic indicators when compared to the other jurisdictions of Saskatchewan, Nova Scotia and New Brunswick. Another factor relied upon was the manner in which Manitoba's bonds are rated. Manitoba is higher than the other three provinces in the eyes of all three bond rating services from whom information was provided. As for average incomes and expenditures, the chart at page 35 of the Judges' brief showed Manitoba being in the middle of the provincial pack.

The Judges challenged some of the information presented by the Province on the issue of Manitoba's economic strength. Particularly, the Judges questioned Manitoba's reference to our province ranking lowest for two of the six representative families and third lowest for the other four, whereas Manitoba came fourth on a cross-country comparison for higher income earners. The Judges also challenged the Province's reliance upon the inordinately wet spring and the impact that might have on economic performance in 2005 if not beyond.

Without repeating other factors previously raised, the Judges also questioned the Province's reliance upon a comparison to deputy ministers' salaries, and directly challenged the Province's assertion that working conditions for judges are superior to those of other Manitobans. The Provincial Court sits in 67 different locations in Manitoba with only six permanent court sittings (Winnipeg, Brandon, Dauphin, The Pas, Thompson and Portage la Prairie) situate within the province. Members of the court travel to 61 circuit points, with varied obstacles encountered including some lengthy plane rides, boat rides, snowmobile rides and some, to use the words of counsel for the Judges, quite appalling facilities in which to conduct court. In that respect, the Judges relied upon photographs certain of those facilities illustrating that fact.

The Judges also refuted the assertion of the Province concerning security of tenure and the fact that the higher the security of tenure the lower the compensation should be. The Judges also refuted any comparison or reference to MGEU and Legal Aid Lawyers' Association settlements or arbitration awards. While acknowledging that judges across Canada have received very significant compensation increases, the assertion was made that it was simply not appropriate to compare Judges' increases with other sectors, nor to compare those increases with the Consumer Price Index particularly given the history of the manner in which Judges' compensation had been dealt with in the past.

6. Position of Manitoba on Statutory Criteria

The Province took issue with a number of the submissions made by the Judges. In particular, they pointed out that JCC #5 did rely on past precedent and therefore it is not the role of the commission to take a fresh look, but to rely on precedent and to have a good reason to depart from a prior decision. A committee must look at the prior decisions and do a comparative analysis. Otherwise, the committee would be rejecting an accepted recommendation of a prior JCC.

The Province agreed that the public interest is to be taken into account in the determinations, and were it not for the importance of Manitoba's public interest, one would probably be considering a formulaic approach to determining compensation.

However, that is not what is mandated legislatively or what other JCCs have done in the past. It was noted that the Judges are seeking a formulaic approach. Obviously what happens elsewhere is relevant, but this committee has to look at what is relevant from a Manitoba point of view.

The Judges dealt with the concept of relative parity, and submitted that there needs to be relative parity amongst provincial court judges. The Province submitted that there is no basis for such a claim. The Province stated that the Judges' argument ignores Manitoba conditions. It also ignores the fact that the pool of applicants for provincial court positions is inevitably Manitoba lawyers. It was noted that each of the committee members are Manitoba lawyers, and the question was posed as to

whether or not we have income parity with lawyers across the country. It was obvious that we do not.

The Province also dealt with the Judges' submission respecting the relevance of federal judges' salaries. The Province argued that the use of federally appointed judges' compensation either directly as in other years, or indirectly as in this year for national averaging, is inappropriate. For federal appointments, there is a necessity to maintain a uniform salary across Canada as there is a need to attract candidates in all of the provinces. These are not conditions that apply in Manitoba.

The Province made reference to developments in New Brunswick, and in particular at the trial and Court of Appeal level. It was highlighted that because the commission in New Brunswick looked at the federal government's salaries, the government's rejection of the commission's recommendations was rational because the government said federal payments were not relevant.

The Province stated that one of the touchstones in *The Provincial Court Act* is the three province average. It is common ground that that is there because there is some similarity in the economic conditions between the provinces, and therefore those provinces make a better comparator, at least for threshold purposes. The Province noted that it is for that same reason that public servant salaries in Manitoba are also an appropriate touchstone for the increases judges obtain.

It was noted that JCC #4 acknowledged that there was a differential between these salaries, and it was submitted that provinces who resemble Manitoba are far better as comparators, and that clearly local economic circumstances are relevant.

The Province dealt with the Judges' submission with regards to the importance of having objective criteria. The Judges argued that three of the factors listed in *The Provincial Court Act* are the most important. The Province noted that those three factors relied upon by the Judges were not related to Manitoba factors. They were factors subparagraphs (a), (b) and (f). The Province argued that there was no prioritization in the legislation with respect to subparagraphs (c), (d) and (e). It was also noted that much of the Judges' submission reflects their views that one determines economic conditions based on Stats Canada figures and cost of living increases and then one moves on from there.

The Province disagrees with this approach. Part of what is missing from that analysis is that in factor subparagraph (b), there is a local component because the pool of candidates for provincial judges are Manitoba lawyers earning salaries at certain levels. Therefore, two of the six factors have a connection to extra territorial events.

The Province pointed out that factor subparagraph (a) is the same for every province and there is no extra territorial reach to that factor. Factor subparagraph (f) is therefore the only one with a real extra territorial reach. The rider in subparagraph

(f) is that it is only after having regard to the differences between those jurisdictions that one is brought back to the consideration of the local component.

The Province stated that while the Judges said there are no appropriate comparators, the issue is broader than that. The Province pointed out that there are other lawyers involved in the judicial system, including crown attorneys, defence counsel, correction officers, senior officers, and external counsel paid at government rates.

The Province posed the question as to what is the rationale for such discrimination other than judicial independence and financial security. It was argued that once judges get to a level that is attractive to those who serve and compares extremely favourably to those in receipt of public funds given to external factors outside of Manitoba, any changes in compensation must be minimal. The Province argued that the process of setting salaries ensures the independence of the judiciary. In other words, the government cannot do anything unilaterally, but that has nothing to do with the issue of appropriate comparators in Manitoba.

The Province also dealt with the Judges' assertion that more private counsel applied for positions to the Court of Queen's Bench, and more publicly employed lawyers applied for the Provincial Court appointments, and the basis for this is that the money was not sufficient to attract people to the Provincial Bench.

The Province noted that other reasons are extremely likely for this discrepancy. In particular, those in public service are likely to be attracted to public service. Secondly, Provincial Court judges deal with criminal law in the vast majority of matters. In the Court of Queen's Bench, judges are dealing with a variety of matters. Lawyers who practice criminal law would likely go to the Provincial Court. The number of lawyers in private practice doing criminal law is a low percentage. One would expect a larger percentage of applicants for the Provincial Court would come from the Crown and Legal Aid lawyers.

With respect to the consideration of prevailing economic conditions, the Province submitted that Saskatchewan is entitled to virtually no equalization payments from the federal government, and therefore Saskatchewan should not necessarily be linked to Manitoba. The Province noted that some weight should be given to salaries paid to senior civil servants as this has been the approach by past JCCs. The Province posed the question "when is enough?". The Province stated that the Judges' approach is to compare Manitoba to a province with little policy to reduce public debt.

With respect to the compensation paid in other jurisdictions, the Province disagreed with the Judges' submission. Federally appointed judges are not another jurisdiction for the purposes of the Act, as Canada does not have a Provincial Court. The New Brunswick decision is proof positive of the irrelevance of federal judges' salaries to that of provincial judges' salaries.

While the Judges argued that at some point salaries will reach an equilibrium, but that has not been reached as of yet, the Province posed the question as to how one will know and how will the public know when such an equilibrium is reached. One does not know the test for an equilibrium. If each province continues to compare the dollars paid by each other, there will continue to be a leap frog effect. With respect to the issue of MLAs' salaries, the Judges say they are not relevant because they are highly political in nature. The Bachman report was rejected by government because they presumably felt that the general public would not accept such increases. It was noted that the recommendation of this commission goes to the legislature, and that is the same legislature which rejected the report on MLAs' salaries. Should the legislature apply a different standard to the recommendations of this commission than to the standard applied to their own salaries?

The Province acknowledged that Manitoba was not to be considered a "poor prairie province" as that term was utilized by counsel for the Judges in her closing submission. That said, the Province did introduce various economic reports in the form of articles within the *Winnipeg Free Press* which painted a slightly more sobering picture of Manitoba's economy. For 2005, it was predicted that Manitoba would enjoy 2.5% real growth which was greater than the 2.4% enjoyed in 2004, but less than the 2.9% anticipated nationally.

The Province asked that we underscore the importance of the reference in three of the subsections of Section 11.1(16) to Manitoba's economic conditions because the

same pot pays civil servants and provincially appointed judges and therefore it is only logical to link our analysis to what is actually happening in Manitoba.

The Province spent some time addressing the question of the high quality of recent appointments to the Provincial Bench, the fact that retention is a non-issue because nobody has resigned, and the fact that although there is certainly some duplication among those who apply for vacancies as they come available, the fact of the matter is that there is a goodly number of quality applicants who appear ready, willing and able to accept an appointment to the Provincial Bench.

As to subparagraph (c) the Province acknowledged that this was not about ability to pay. The Province does not say that it cannot afford to pay more to judges. Indeed, any taxing authority usually has the ability to pay. Whereas the Judges say Manitoba is best positioned of the three, the Province contends that the economic factors are pretty neutral and that projections are simply projections.

As for the "made in Manitoba" approach, the Province urged us to remember that the pool of judges is drawn from the pool of Manitoba lawyers, and that the present compensation package should be treated as being extremely attractive to the private bar, and particularly when the pension benefit is taken into account.

The fourth factor (subparagraph (d)) is linked to the commitment Manitoba has made to be an affordable government. While other provinces are not concerned with escalating debt loads, Manitoba is most clearly concerned that our young people

and their young can afford to live here. Balanced budget legislation is part of the same concept and is something that is working in Manitoba and of which we should be mindful in analyzing the manner in which Judges' salaries might be altered.

As for the fifth factor (subparagraph (e)) relating to cost of living issues, the Province simply acknowledged that Manitoba's increases in cost of living have been more modest than in other jurisdictions.

Next, in addressing the sixth factor (subparagraph (f)) the Province reminded us that from JCC #4 onward, significant increases, calculated as a percentage, have been awarded to the Judges and that, when a comparison is drawn between 1986 and 2005, the Judges have enjoyed rather unprecedented increases in their salary levels as compared to any other member of Manitoba society. The Province asked the question "Where does it stop?" In addition to the salary increases, of course, there have been the significant pension enhancements which, when the total compensation is looked at, really do place Manitoba's judges in a significantly enhanced position over that which they enjoyed as recently as 5 or 10 years ago.

The Province argued that provincial judges have fared very well indeed. If one looks at MLA salaries, Manitoba ranks eighth. While acknowledging that an MLA's salary ought not to be compared to a judge's salary, salaries paid to MLAs are still relevant to consider when analyzing salaries to be paid to judges.

7. General Principles

The parties outlined certain basic principles underlying their submissions which should form part of this report. We feel it is appropriate to itemize these issues and indicate our view on each of these areas after having carefully considered the parties' presentations both orally and in writing.

The general issues that warrant comment are:

- (a) Judicial independence;
- (b) Economic climate;
- (c) Statutory considerations - national average;
- (d) Three province average;
- (e) Total compensation;
- (f) Federal/Deputy Ministers.

7.1 Judicial Independence

Judicial independence is outlined in the *Act* as one of the six factors to be considered in assessing judicial compensation. Judicial independence is essential for maintaining the rule of law in a free and democratic society. The importance of judicial independence has been confirmed by the Supreme Court which stated that financial security, security of tenure, and administrative independence are characteristics of judicial independence.

Both parties are agreed as to the importance of this consideration.

7.2 Economic Climate

As they did during the hearings for JCC #5, the Province indicated that this committee should make recommendations that are in line with a "made in Manitoba" approach. This principle is predicated on the view that the recommendations must reflect the economic climate of the province and bear a relationship to the citizens they serve and the salaries paid to other senior level officials of government.

Every province has their own legislative code providing for the basis of determination of appropriate compensation levels. Care must therefore be taken to compare one province to another.

The Province urged that Manitoba's economy be carefully assessed and analyzed. Provincial judges' compensation is at an appropriate level and well above the compensation paid to deputy ministers and cabinet ministers. One must look at the payor and who they pay.

Manitoba has experienced a difficult year economically due to depressed conditions in the farm economy resulting from a wet spring.

In addition, citizens of Manitoba make sacrifices to achieve public policy goals such as zero deficits.

Furthermore, Manitoba continues to receive equalization payments from the federal government, while Saskatchewan, because of energy and resource price escalation, is no longer a recipient.

Ultimately, the question is whether there has been a change in circumstances from the past when previous JCCs determined that Manitoba is about the median among Canadian jurisdictions in terms of income and expenses, and its economy ranks on the basis of many indicators in the middle range of the provinces in Canada.

We were provided with a great deal of financial information regarding Manitoba's economy and forecasts for future growth and performance. Both parties were agreed that there are a number of economic indicators, some of which can be conflicting. Manitoba continues to have a low cost of living. We agree with the Province's submission that the cost of living information and the real per capita income in Manitoba point to a "reasoned, fair, and practical approach" to judicial compensation in light of Manitoba's cost of living and the real per capita income of the residents. Unemployment remains low. There is optimism about the potential sale of hydro-electric power and overall export prospects are bright.

We note that in its written Reply Brief, the Province commented:

The parties seem to be in general agreement that Manitoba is positioned reasonably in terms of its economy. Manitoba continues to work towards paying down its significant public debt while approaching its financial spending in a prudent and responsible manner.

Overall, we believe that Manitoba continues to operate in the mid-range of the provinces. There has not been any significant change since 2002 which would warrant a change in approach when we stated:

Overall we are convinced that consistent with JCCs, Manitoba is about the median among Canadian jurisdictions in terms of income and expenses and its economic rank, on the basis of many indicators, is in the middle range of the provinces in Canada.

We also, as did JCC #5, accept that any recommendations must take into account the economic conditions in Manitoba as it is Manitoba taxpayers who pay the taxes to fund the increases in compensation.

7.3 Three Province Average

As we stipulated in JCC #5, the three province average is a significant factor in the determination of fair and reasonable compensation. As noted earlier, we stated in JCC #5:

Of particular note is section 11.1(23) of the *Act*, which establishes that our recommendations will be binding on the parties if the salary recommended for the Judge's position for the year is equal to or less than the designated average for that judicial position.

Therefore, even though the three province average is not listed as one of the six statutory factors in the *Act*, we continue to believe that the fact that the government will be bound to salary recommendations equal to or less than the average is very relevant to our determination and is a useful comparator.

To the extent there is any uncertainty as to the legislature's intention regarding the three province average, we noted the comments by The Honourable Gord Mackintosh (Minister of Justice and Attorney General) when amendments to the *Act* were presented for second reading:

To provide some certainty in the process, if the recommendation of the Judicial Compensation Committee regarding salaries for provincial court judges is equal to or less than a designated average of salaries paid in three other provinces, then the salary recommendation is binding and must be implemented by the Government.

All previous judicial compensation committees, that is, those committees being chaired by Messrs. Baizley in 1991, Green in 1995 and Green again in 1998, have recommended the average salary in New Brunswick, Nova Scotia and Saskatchewan as the appropriate level of compensation. These provinces are similar to Manitoba based on population base, working conditions, cost of living and ability to pay.

If the salary recommendations from the committee are greater than the designated average, they will be referred to a standing committee and ultimately to the Legislative Assembly.

We are also mindful that the three province average can be based on old data. In that regard, we accept that the situation in New Brunswick has to be carefully considered. We view it as an anomaly in that due to ongoing litigation, JCC for 2004

in New Brunswick has not yet reported and that the known salary for New Brunswick at the time of the writing of this report is \$150,706.00 for 2003.

As a result, we do not think meaningful weight can be placed on the current salary level paid to New Brunswick judges, nor do we think that the legislature would have intended that we do so in light of the fact that the salary paid to judges in that province stems from a decision of government which rejected recommendations made by that province's 2001 JCC, and no subsequent JCC has had an opportunity to deal with that issue.

7.4 Statutory Considerations and National Average

The Judges urged that we utilize the national average for salary as a primary basis for recommending salaries. They ballpark the national average at approximately \$180,000.00 per annum. They deny that this is a formulaic approach, but insist that the national average best takes into account the six statutory factors set out in the *Act*.

The Province counters by stating that the concept of a national average is not in keeping with the intention of the Legislature and is not an appropriate benchmark. In addition, they point out that the salary paid to federally appointed judges is not one of the statutory factors.

We do not believe it is appropriate to link our recommendations on salary to a national average, however that average is calculated. If the Legislature intended this to be the benchmark, they could have stated so in clear and unequivocal terms. Rather, they chose to set out six factors to be considered. In addition, they chose to place weight on the salary paid in Saskatchewan, Nova Scotia and New Brunswick.

In our view, the determination of fair and reasonable compensation is best determined by a careful weighing and balancing of all the relevant factors, not by a strict application of a mathematical formula. As we pointed out in JCC #5, not all the factors listed in the legislation are capable of precise quantification.

Furthermore, the Judges have submitted that certain of the statutory factors are more important than others. In particular, they say (a), (b) and (f) of subsection 11.1(16) are of the greatest significance, and (f) is the most reliable indicator.

We disagree. All factors must be considered. We agree with the Province that there is no prioritization set out in the legislation.

In the final analysis, this committee must follow the direction of the legislature which has been set out in the *Act*. It is our role to make recommendations for fair compensation, dictated by the public interest, after considering all the factors in the legislation along with other factors deemed relevant.

7.5 Total Compensation

The parties agree that a JCC should determine compensation on a "total compensation" basis. The Act requires certification of a three province average on salary alone and not on the basis of other benefits.

Prior JCCs have accepted a total compensation model and have indicated for example that, but for pension increases, salary increases may have been higher.

We have continued to apply this model in arriving at our recommendations.

7.6 Federally Appointed Judges

The Judges argued, as they did before JCC #5, that the level of compensation paid to federally appointed judges is relevant and that the real issue is what weight should be given to these salaries. They suggested that the way to give relevance to them is to include them in the establishment of a national average. We were provided with various calculations by the Judges which excluded certain provinces (i.e. Manitoba and Nunavut) to assist us with our task.

The Province, as they also have in the past, stipulated that federal judicial compensation is of little assistance and, in fact, should not be considered as one of the jurisdictions in factor (f) of section 11.1(16).

We have earlier commented that the use of a national average for determining salaries is not a mechanism that we endorse for the reasons stated. As we said in our 2002 report (in discussing federal salaries) "we agree that this is one factor to consider in our overall deliberations, but it is certainly not determinative".

We continue to be guided by the above principle.

7.7 Deputy Ministers

The Province submitted that the level of compensation of the deputy attorney general should be a consideration in determining the compensation level for provincial judges. The Province referred to JCC #4 which indicated that deputy ministers' salaries should be taken into account. They pointed to the significant responsibilities assumed by deputy ministers in carrying out their appointments, and stated that deputy ministers are paid out of the same "pot" as judges.

The Province pointed out that in 1992/93 a provincial court salary was 80.4% of a deputy minister's salary. Now it is 117.6% of the salary. A deputy minister earned \$137,177.00 in 2004/05 as compared to \$161,257.00 for a provincial court judge. When pensions are considered as well, including a 3% accrual rate per year as compared to a 1.8% rate for deputy ministers, the differential is even greater.

The Judges countered by indicating that there is only a tenuous basis for comparison with deputy ministers. The best comparison is with other provincial

court judges.

We agree that the most relevant comparators are other provincial judges, and particularly those in Nova Scotia, New Brunswick and Saskatchewan. The *Act* makes no mention of the compensation levels of senior civil servants and therefore we remain of the view that, at most, a deputy minister's salary is relevant as an indicator of a government's ability to pay and not as helpful as a comparator as the compensation of other judges, both federal and provincial.

8. Salaries

8.1 The Provincial Court Judges' Association Request

The Judges indicated that increases in salary along with guaranteed indexing of pension were their priorities.

In their written submission, the Judges stated:

It is the position of the Judges that Manitoba judges ought to receive compensation that is comparable to a properly and reasonably established Canadian average. We are not suggesting this in terms of any mathematical formula, nor are we suggesting that the JCC abdicate its responsibility to others. What we are saying is that at this time, all the indicators point to this as being fair and reasonable compensation for judges in light of the factors set out in the statute and others that the JCC may consider relevant.

The Judges reiterated that factors (a), (b), (f) of subsection 11.1(16) have the greatest significance of all the criteria set out in the statute.

The Judges' formal request for salary was:

That the salary effective April 1, 2005 be increased to a salary in line with a properly and reasonably established "national average", and that cumulative CPI adjustments be applied to this figure for each of April 1, 2006 and April 1, 2007.

The Judges noted that their current salary of \$161,257.00 per annum is lower than all but three jurisdictions in Canada.

While the Judges proposed that the Judges be paid a national average, they acknowledged that it was impossible to establish a precise national average because of the uncertainty in a number of provinces. Having said that, the Judges proposed that a figure in the range of \$180,000.00 per annum, plus a cost of living increase in each of the next two years, would be fair and reasonable compensation.

The figure of \$180,000.00 is \$1,000.00 less than the current national average (excluding Manitoba and Nunavut). The national average is on the rise and it may not be until 2008 that one may be able to argue based on real figures, but the reality is that one has to take all the various factors into account.

Respecting the certification of the three province average, the Judges noted that it is not specifically listed as one of the statutory factors to be considered. It was submitted that the three province average is more unreliable now. The Judges stated that they are not asking to be linked to federal judges' salaries as they had done in the past.

Overall, the Judges again stated a figure in the neighbourhood of \$180,000.00 is appropriate based on the six factors listed in the *Act*.

8.2 Province's Response

Many of the Province's submissions are outlined earlier in this report. Any increases to Judges' salaries have to be sensitive to the views of the average Manitoba taxpayer.

The Province argued that the Judges picked the figure of \$180,000.00 "out of the air" and stated that the use of a national average is not an appropriate benchmark for determining the salary of Manitoba Judges.

The Province referred to the Government of Canada's response to the 2003 Judicial Compensation and Benefits Commission. It was noted that the Federal Commission took into account salaries of all senior officials appointed by government (including deputy ministers), and in particular to incomes earned by lawyers in private practice.

The Province referred to survey information of lawyers' salaries in the Canadian Lawyer magazine. Approximately 64% of lawyers in Manitoba and west of Manitoba and 66% nationally earn less than the provincial judges. It was submitted that if one takes into account as well the value of the of the Judges' pension, there does not appear to be any reason why the current package is not highly attractive. Furthermore, based on the number of applications for positions, there is not any difficulty attracting qualified candidates.

The Province submitted that taking into account all the relevant factors, the present salaries are fair and reasonable. They have increased substantially since 1999.

Overall, close attention must be paid to conditions existing in the Province of Manitoba. Judges earn salaries well above other senior government officials, and salaries cannot keep escalating at the rate they have in the past. Compensation levels should be reflective of Manitoba economic conditions and the relative compensation levels of Manitoba workers. A "made in Manitoba" principle is an important factor.

The Province submitted that any increase to Judges' total compensation should be minimal.

8.3 Certification

The Provincial Court Act mandates that the JCC certify as of April 1, 2005, the salary

paid to the Chief Judge, Associate Chief Judge, and Judges of New Brunswick, Nova Scotia and Saskatchewan, and to certify the designated average of these three positions.

The salaries are:

	<u>Chief Judge</u>	<u>Associate Chief Judge</u>	<u>Judge</u>
Saskatchewan	\$175,190.00	\$170,190.00	\$165,190.00
Nova Scotia	\$182,000.00	\$177,000.00	\$172,000.00
New Brunswick	\$160,706.00	\$155,706.00	\$150,706.00

The designated averages are:

<u>Chief Judge</u>	<u>Associate Chief Judge</u>	<u>Judge</u>
\$172,632.00	\$167,632.00	\$162,632.00

8.4 Salary History in Manitoba

Prior to the first JCC, salary changes for Provincial Court Judges were set by Order in Council. There was no external review process. As set out in JCC #4, Judges' salaries were often equated to a step in the Senior Official 6 or 7 civil service salary scale. These levels were also used for Senior Deputy Ministers.

We are reproducing a table which originally appeared in the Freedman Report (p.43) and which sets the salaries of Judges, the Associate Chief Judges, and the Chief Judge. We have added to this chart the salary increases recommended by the

Freedman Report and adopted by the legislature and those recommended by JCC #5 and adopted by the Legislature.

TABLE 1
MANITOBA PROVINCIAL JUDGES' SALARIES
1986 - 2004

	<u>Judges</u>	<u>Associate Chief Judge</u>	<u>Chief Judge</u>
1986	72,660	74,660	79,660
1987(1)	74,309	76,309	81,309
1987(2)	76,541	78,541	83,541
1988(1)	79,491	81,491	86,491
1988(2)	81,874	83,874	88,874
1989(1)	85,090	87,090	92,090
1989(2)	88,607	90,607	95,607
1991	91,274	93,279	98,272
1992(3)	91,274	93,279	98,272
1993	94,017	96,017	101,017
1995	96,173	98,173	103,173
1996	96,173	98,173	103,173
1997(3)	105,000	108,000	112,000
1998	112,000	115,000	122,000
1999	122,000	125,000	132,000
2000	133,000	136,000	143,000
2001	144,000	147,000	154,000
2002	152,000	159,000	162,000
2003	156,560	161,560	166,560
2004	161,257	166,257	171,257

- (1) Increase resulting from movement to a higher step in the salary range (i.e., based on civil service scale).
- (2) Increase resulting from an overall increase to the salary range (i.e., civil service).
- (3) Introduction of Judges' supplementary pension plan (pension improvement not reflected in salaries).

It is interesting to note that Judges' salaries increased by 3% in 1993, 2.3% in 1995, 9% in 1997, 7% in 1998, 8.9% in 1999, 9.02% in 2000 and 8.22% in 2001. Since

1986 Judges' salaries have increased from \$72,000 to \$161,257.00. This does not include pension plan improvements in 1992 and the recent changes in 2002 retroactive to 1999. It is, of course, important to note that Provincial Court Judges' salaries in Manitoba lagged behind other provinces in the 1990's and significant increases were obviously warranted.

8.5 Salary Recommendations

We are mindful of the Supreme Court's recent comments that reports of previous commissions and their outcomes form part of the background and context that a compensation committee should consider.

We are also aware that the Supreme Court left open the possibility of a new commission accepting a prior commission's findings and reports and making only minor adjustments or alternately due to particular circumstances going beyond the findings of the prior commission.

JCC #5 was the first committee to apply the statutory principles set out in the amended *Act*.

As stated in our review of the general principles, numerous findings and conclusions made by previous JCCs continue to be applicable when determining the issue of fair and reasonable compensation. We have emphasized these points earlier in our report.

In arriving at our conclusions and recommendations as we did for JCC #5, we have taken into account the role of the provincial court judges in a free and democratic society and the need to maintain the independence of the judiciary.

The present compensation package ensures this independence. But we are bound to balance the above with consideration of the provisions of *The Provincial Court Act*. Provisions vary from province to province. Therefore, care has to be taken in analyzing the findings in a specific province.

We feel that the intention of the legislature must be carried out by a proper application of the factors set out in s. 11.1(16) of the *Act*.

As stated above, we believe that a number of observations and comments made by JCC #4 and JCC #5 are equally relevant today as they were at the time they were made and we are guided by them in coming to our recommendations.

There has not been any change in circumstances or other developments which would cause us to change our views on these factors.

Overall, we believe that Manitoba has continued to recruit and retain qualified people for the bench. This, however, does not preclude us from making an adjustment to the salaries.

Ultimately, as stated earlier, the determination of a fair and reasonable salary cannot be determined by strict application of a mathematical formula. It requires a careful consideration and balancing of all the relevant factors, statutory and otherwise.

We recognize that salary levels in a number of provinces remain uncertain. The comparison of salaries in other provinces is complicated by the timing and reporting of the various provincial commissions and also by reason of the ongoing litigation.

For example, the 2004 JCC for New Brunswick has been put on hold due to the litigation before the Supreme Court.

As we commented in JCC #5, timing is an important factor as province's commission report at different times. We are also sensitive to the Province's suggestion that there is a potential "whipsaw effect" on salaries as each province implements certain increases based on other province's increases. We accept that there is that potential for a whipsaw effect and have borne it in mind in balancing all the requisite factors.

Overall, taking into account all of the present economic information available, and taking into account all other legislative factors, we believe Manitoba should be at or near the mid-range of Provincial Court salaries across Canada, and that we should give extremely close consideration to the Three Provinces' salaries.

In so finding, we recognize that the following recommendations place the salary level above the three province average. As earlier noted, this average is subject to limitations because of timing of various compensation committee reports.

We believe that the proposed salary levels are fair and reasonable. These recommendations will place Manitoba slightly below Nova Scotia. Manitoba will be ahead of Saskatchewan for 2005, but well below for 2006 and 2007. If the recent recommendations are accepted, Manitoba Judges will remain well behind judges in the "have" provinces. The recommended increase for 2005 will bring up the Judges' salaries to an appropriate level based on our consideration of all the relevant factors. The 3% increase for 2006 and 2007 is in the range of increases negotiated by other wage earners in this Province. While the recommended increase will place Manitoba ahead of present New Brunswick salaries, we do not believe any meaningful weight can be placed on the current salary level paid to New Brunswick judges by reason that their levels are outdated due to the ongoing litigation.

Therefore, we recommend the following annual salaries for the provincial court judges commencing April 1st in the year indicated and ending March 31st in the subsequent year:

2005 -	\$168,000.00
2006 -	3.0% increase = \$173,040.00
2007 -	3.0% increase = \$178,230.00

9. Pensions: History and Present Structure

Prior to 1992, the pension contributions and benefits for Provincial Court Judges were the same as other participants in the Province's Civil Service Superannuation Plan ("CSSP"). The benefits were determined by a formula calculated on the best five years average pensionable earnings, at a two percent accrual rate, multiplied by years of pensionable service, adjusted by a formula. In 1992, a supplementary Plan was established. Full-time service as a Judge accrued on and after that date. This Plan provided benefits that, when combined to those the Judge receives under the CSSP, would produce the result that would be produced if the calculation of the allowance was based on an accrual rate of 2.61% (instead of 2%) of final average salary per year of service. The maximum number of years of service accrual equals 23.5. After that, judicial service continues to accrue under the CSSP until 70% maximum is reached, in about five more years.

JCC #3 recommended and Mr. Justice Wright approved that supplementary benefits be extended to cover judicial service before July 1, 1992, commencing from the date of appointment to the Bench.

JCC #4 recommended and the Legislature implemented two major changes to the Pension Plan. JCC #4 noted that "Manitoba's pension in all three cases (20, 23.3 and 28.1 years of service) is substantially below the Three Provinces' pensions, and

in some cases, by much greater margins below those in every other jurisdiction in Canada".

In making its recommendations for changes, JCC #4 also states that its "report and changes are premised on a total compensation model, and were it not for the salary recommendations, we may have recommended further improvements in the pension arrangement or other benefit enhancement".

The Judges' other requests for pension enhancements were not recommended by JCC #4. At that time, the Judges were requesting, among other things, a stand alone Plan, and a higher accrual rate of between 3.5 and 4.67%. JCC #4 estimated the increase in service costs of the Judges' requests to be \$1.2 million per year.

The changes to the Pension Plan as a result of JCC #4 had the following financial impact.

1.	Increase in accrued liabilities (one-time as at March 31, 2002)	\$8,381,915.00
2.	Annual cost	
	- Salary rate updates	\$ 226,900.00
	- Spousal coverage	\$ 233,100.00
	- Best 3 year	<u>\$ 56,200.00</u>
		\$ 516,200.00
3.	Interest cost	\$ 534,000.00 (approx.)

JCC #5 recommended that the Plan be amended to allow a full pension after 23.5 years, requiring an accrual rate of 3.0%.

These changes to the Plan as a result of JCC #5 have the following financial impact:

1.	Increase in accrued liabilities (one-time)	\$5,441,371.00
2.	Annual service cost	\$ 516,200.00
3.	Interest cost	\$ 534,000.00 (approx.)

9.1 **The Provincial Court Judges' Association Request**

The Judges stated that pensions are an integral part of the compensation system. The Judges' top priority is guaranteed indexing (equal in priority to its salary request). In addition, the Judges were seeking a modified rule of 80 or a 20 year pension plan, and a separate pension plan.

John Corp, a consulting actuary, testified for the Judges, and Dennis Ellement testified for the Province. Their evidence will be reviewed later in this report.

The Judges' requests will be outlined separately.

(i) **Guaranteed Indexing**

The Civil Service Superannuation Fund ("Fund") provides for indexing of pensions at the rate of 66.7% of the percentage increase in the Canadian CPI in any year on a discretionary basis. The Province is liable for ½ of the indexing, while the Civil Service

Superannuation Board ("Board") determines whether the Cost of Living Account of the Fund is able to finance the other portion of the increase.

The Judges seek guaranteed annual indexing at 100% of yearly CPI for Canada. The Judges referred to the provisions for indexing in each province.

The chart is reproduced here:

	Form of Indexing	Guaranteed / Discretionary
Newfoundland	60% of CPI for Province up to 1.2%	Guaranteed
PEI	Plan 1 - 100% CPI for Canada to a max of 8%	Plan 1 - guaranteed
	Plan 2 - 100% CPI for Canada to a max of 6%	Plan 2 - guaranteed
Nova Scotia	Plan 1 - 100% CPI up to 6% per year	Plan 1 - discretionary
	Plan 2 - 100% CPI up to 6% per year	Plan 2 - discretionary
New Brunswick	Plan 1 - 100% of CPI for Canada up to 6%	Plan 1 - guaranteed
	Plan 2 - 100% of CPI for Canada up to 5%	Plan 2 - guaranteed
Quebec	Plan 1 - 100% CPI for the Province for service earned prior to July 1, 1990 plus CPI for Province over 3 % for service between July 1, 1990 to December 30, 1999 plus CPI for Province over ½% for that service earned after December 30, 1999	Plan 1 - guaranteed
	Plan 2 - 100% CPI for Province over 1%	Plan 2 - guaranteed
Ontario	Double indexation: to	Guaranteed

	AIW (Average Industrial Wage Index) plus to the current salary of a judge of the same rank	
Manitoba	66.7% of CPI for Canada	Discretionary
Saskatchewan	75% of CPI for Province up to 5% of CPI and 50% of CPI for Province for that over 5%	Guaranteed
Alberta	CPI for the Province up to 6%	Discretionary
British Columbia	As determined by Board of Pension Trustees annually	Discretionary
Northwest Territories	100% of CPI for Canada	Guaranteed
Yukon	100% of CPI for Canada	Guaranteed
Federal Government	100% of CPI for Canada	Guaranteed

The Judges expressed concern whether indexing will occur at all or be minimal. They referred to the CSSB Connection Bulletin, Volume 6, Number 1, which stated:

When inflation is about 1%, the indexing account should be able to pay COLA increases equal to 2/3rds of the increase in the Canadian Consumer Price Index. If inflation reaches higher levels, a funding deficiency could result and the indexing account may be insufficient to pay COLAs this large. In order to ensure the fund's ability to continue to pay COLAs similar to those paid in the past decades, improved funding would be required.

The Judges provided actuarial tables prepared by John Corp which outlined the impact on the pensions if inflation rose above 10%.

The Judges requested that a separate plan text be finalized by August 1, 2007, which will be the effective date.

The terms of the plans would be as follows:

- (1) It should be based solely on judicial service;
- (2) It should be mandatory for all judges appointed after its effective date;
- (3) It should provide those benefits that currently exist (including any changes implemented following this JCC's report), modified in a fashion suitable to a stand-alone plan;
- (4) It should include transition provisions for existing judges. Existing judges should be given the option of joining the new plan, subject to the following principles:
 - (a) those who elect to join the new plan lose none of their current or vested benefits; and
 - (b) those who remain in the old plan continue to benefit from any subsequent plan improvements recommended by this or future JCCs.

The Judges pointed out that it has long been recognized that the design of the CSSP was inappropriate for Judges and that significant difficulties result from the ongoing relationship of the CSSP and the Judges' Supplementary Plan. This has given rise to problems in coverage and administration. The Judges also argued that a separate plan would address the inequities that exist between members of the Bench coming from private practice and those with prior non-judicial service with government.

(ii) Separate Plan

The Judges pointed out that they had made a similar request before JCC #4 and the Province opposed this request and one for a detailed plan text. The Province now indicates they are planning to provide a plan document. The Judges oppose this proposal and cannot understand the Province's reluctance to agree to a separate plan.

(iii) Modified Rule of 80 or 20 Year Plan

The Judges acknowledged this would place the Judges ahead of some provinces. It is however important to the Association as a goal, while it is not presently a priority.

The Judges stated that while Dennis Ellement testified that there is a present surplus available to fund the cost of living account, one cannot leave the decision to the government. A decision involving Judges' compensation has to go before a JCC.

The Judges also highlighted that judges in other jurisdictions are substantially better off because of the degree of indexing. Overall, the Judges submitted that they are currently bearing the risk. Anything less than 100% indexing will result in erosion.

With respect to the Province's submission that future commissions can worry about erosion, the Judges submitted that one cannot rely on future JCCs because they

cannot make recommendations for retired judges.

The Judges also dealt with their proposal for changes to the pensions respecting the Chief Justice and Associate Chief Justice. Historically, if you became a Chief Justice or Associate Chief Justice, you retired in these positions. Now there are seven year terms. The Judges want pension provisions to adequately reflect the higher monetary contributions by these judges.

The Judges' proposal for reform was as follows:

For each year of service in these positions, the Chief Judge or Associate Chief Judges should be credited with a proportionally higher service credit in the determination of their pensions. For instance, if the salary differential was 5% and 10% respectively for Associate Chief Judge and Chief Judge, they would earn 1.05 or 1.10 years of service credit for each year of service in that position for the purposes of determining their pension. For the red-circled years, a lower figure would apply based on the percentage difference between the two salaries. In exchange for this additional service credit, if they retired immediately following their term as a Chief Judge or Associate Chief Judge, the calculation of their best three year average would be based on the best average salary had they been a puisne judge during the period. To be clear, for those in the administration positions currently, the change should apply for all years in those positions.

When they retire, theoretically there are two options in terms of how to proceed. They could be considered eligible to retire a few months earlier than otherwise as a result of having accumulated service slightly faster for 7 years, or they could be entitled to receive a slightly higher pension. Under the second option, for instance, assuming a 3.0% accrual rate, a 10% salary differential, and no period of red-circling, the Chief Judge would retire with a pension of 72.09% of puisne judge salary (calculated based on $3.0\% \times 24.03$ years, rather than 23.33 because of the higher accumulation of 10% of a year per year over 7 years). This is despite that he or she would still need to meet the same eligibility requirements as usual in order to retire. Alternatively, under the first option, the Chief Judge would be eligible to retire at a 70% pension 255.5 days earlier than normal (70% of a year earlier). It is the Association's position that it is most equitable for those affected to receive a

higher pension, rather than be eligible to retire earlier. This is consistent with its position that a separate plan is required to prevent situations where those with prior non-judicial service in the CSSP are able to retire significantly earlier than others appointed from the private bar.

9.2 Province's Response

The Province argued that it is not unconstitutional for a government to use its discretion with respect to indexing of pensions. Firstly, the existence or non-existence of a surplus depends on market conditions, not government discretion. Secondly, it is not unique for judges to be part of a larger pension plan. Governments are able to reduce judges' salaries in certain situations. Furthermore, the issue of whether or not there is sustainability to cover two-thirds indexing has been the subject of warning for the last fifteen years. Any recent warnings therefore are not unique. The fact that judges are part of the superannuation plan ensures that they get the benefits of being part of a larger plan.

The concept of erosion is a curious one. John Corp's evidence was that erosion does not occur until a person has been retired for at least a year. The JCC does not have jurisdiction to make awards for retired judges. Indexing occurs only after retirement. Guaranteed indexing therefore is not crucial to the financial independence of judges. There is an inconsistency therefore in the Judges' position.

The Judges indicate that there are guaranteed plans elsewhere, that the risk is now on the Judges, and that anything less than 100% indexing is erosion and not

consistent with financial independence.

The Province submitted that therefore all the jurisdictions are contravening these principles because all of them have erosive effects. There are no guarantees of financial security. The Province posed the question therefore "are all of these plans unconstitutional?"

The Province also dealt with the Judges' submission that there be a separate plan. While the Judges' submitted their position on a separate plan was not a cost issue, the Province disagreed. Furthermore, it is important to note that the Judges acknowledge that a separate plan would not address inequities in the plan.

The Province submitted that pension plans are complex at the best of times. While it is acknowledged that there have been some difficulties historically by reason of the top hat provisions superimposed over the superannuation payments, the problems have been compounded by language issues in the past by various JCCs in awarding changes to the plan.

That is why the parties are requesting clarity, and there is also the fact that the courts have intervened and have lent their interpretation to some of the issues in question.

The fact is that having a text that has been requested and is virtually complete, will deal with most of the issues that are outstanding. The Province submitted that any

frustration or anxiety in the past will hopefully be resolved by the provisions of a new plan text to be provided by the Province. The Province questioned whether or not a JCC has jurisdiction to order a separate plan. The jurisdiction with the JCC is to recommend benefits, not the plan itself. In any event, a separate plan will be much more costly. With a smaller plan there will have to be much more conservative investment practices. For example, it was pointed out that the MLA plan was confined essentially to treasury bills for their investments.

The Province submitted that the prudent course of action for this JCC would be to accept that progress has been made in addressing situations which gave rise to anxiety. In the short term, and over the next three years, indexing is sufficiently certain under the current plan. The matter could be considered afresh three years from now. Furthermore, the parties have not put forward an analysis of the costs of a separate plan.

The Judges have proposed a modified rule of eighty, or alternately, a twenty year pension provision. The Province submitted that what is being sought is the best of both worlds. In effect, they are seeking a Saskatchewan model but keeping in place certain thresholds. The Province submitted that there is no compelling reason to make any changes with respect to the modified rule of eighty or twenty year pension. In summary, given the overall value of the compensation package paid to Judges in Manitoba, these enhancements are not necessary or warranted pursuant to the criteria set out in the *Act*.

With respect to the Judges' proposal to provide for higher pensions for service as Chief Judge and Associate Chief Judge, the Province suggested that some Chief Justices and Associate Chief Justices would benefit from such a proposal while others would be hurt if they are in such positions just before retirement. The Province suggested that any perceived unfairness may be best remedied by making Chief and Associate payments non-pensionable. The Judges suggested that this could be done on a go-forward basis or contributions in respect of past years could easily be refunded. The Judges submitted that the current formula is the formula used in nearly every best average salary plan in Canada. It accommodates changes in salary upward and downward over a member's career and chooses a "best scenario" for the member.

9.3 Recommendations

The Judges have sought a number of improvements to their pension plan. Their priority requests are for guaranteed indexing of the pension plan, putting this ahead of modified rule of 80, a 20 year pension and a separate pension plan for judges.

We have carefully considered all of their requests. With one exception, for the reasons that follow, we agree with the Province's submission that enhancements to the pension plan are not necessary or warranted pursuant to criteria set out in the legislation.

The one exception is with respect to guaranteed indexing. As reflected in the chart

reproduced earlier on pages 55 and 56, a majority of the provinces have in place a guaranteed indexing of pensions for provincial judges, including Saskatchewan and New Brunswick. We see no valid rationale for maintaining Manitoba judges in the minority in this regard. In recommending guaranteed indexing, we are mindful of the fact that it is a cost neutral proposal and that the Province's own projections were that the Fund would likely be able to maintain present levels for the next number of years.

However, we are not prepared to accede to the Judges' request that indexing be increased from 66.7% to 100% of CPI. In rejecting the Judges' request for guaranteed indexing at 100% of the pension, we do not wish to signal that this kind of proposal should not be considered by a future JCC. However, after considering the submissions, we are not satisfied on the balance of the evidence that a change is necessary and that the Judges' pensions are at risk. In the short term, the results seem sufficiently certain that pensions will be funded. The matter can be considered afresh in three years. At that time the past performance can be reviewed and also a further comparison can be done of other provinces. At present there is not a consistent pattern of 100% indexing. For example, Saskatchewan has indexing at 75% of the Provincial CPI.

Specifically, we are also not prepared to recommend that a separate plan be set up. There has been no costing done of this proposal. The Province advises that a plan text has been drawn up and will be reviewed with the Judges shortly. This will

hopefully address some of the confusion that has arisen in the past over interpretation issues.

Lastly, we see no reason at this time to recommend moving to a modified rule of 80 or a 20 year plan. This was not proposed as a priority and we do not believe that there is a compelling need to make this change. There are cost implications to this change, and these costs will have to be assessed in the future along with any other proposed changes.

In rejecting the Association's other requests, we have taken into account the principle of total compensation which was outlined earlier in this report. We believe that the salary increases, along with the existing pension provisions, will provide fair and appropriate compensation in accordance with the factors set out in the *Act*.

We are mindful that the two previous JCCs have recommended, and the Legislature has accepted, enhancements to the pension plan. This has resulted in a plan which provides pension benefits which are near or at the top of the types of benefits received by any Manitoban.

In summary, we agree with the Province's submission that other enhancements are not necessary for either recruitment or retention purposes.

10. Other Issues

10.1 Education Allowance

The Judges made oral and written submissions on this issue and called two witnesses. They were:

- (i) Richard Wolson ("Wolson"), a leading criminal lawyer in Manitoba and on the faculty of the Federation of Law Societies Annual Criminal Law Program;
- (ii) George Thomson ("Thomson"), Executive Director of The National Judicial Institute and former deputy Attorney General of Ontario and Canada and a former provincial court judge.

Wolson described the benefits of the criminal law education program run by the Federation. He described this as an ideal program for all provincial court judges, and the best CLE of its kind for the field of criminal law. Attendance from Manitoba provincial judges has been minimal over the years, and in his opinion attendance should be greater. Normally there are up to nine judges from the Queen's Bench in Manitoba.

Thomson described the programs of the National Judicial Institute. Judges never stop learning, and the concept of judicial education has been widely

accepted.

The Institute has a comprehensive program and curriculum. We were provided with a syllabus of the various courses, which include programs for new judges. Manitoba has recently rejoined the Institute.

Provincial court judges have three ways to access the education components of the Institute, including:

- (a) access to the electronic library;
- (b) attending courses;
- (c) self-education using Institute courses.

Some provincial courts have in-house programs and some use a mix of Institute and in-house. Manitoba does court based education. They do the best they can with a modest budget. One judge attended the "New Judges' Skills Course". Thomson opined that every new judge should attend the course. He also said that a dedicated allowance for judicial education was a good idea.

In cross-examination, he acknowledged Manitoba does a good job with the money available. He admitted that judges in Manitoba have not developed their own plans for self-education.

The Judges' request for an Educational Allowance was:

That effective April 1, 2005, current Judges be provided with an education allowance of \$2,500.00 per judge. This allowance is to be used for attendance at seminars or conferences only as approved by the Chief Judge. Those judges seeking to use the allowance would be obliged to request funding through the regular education budget first, and if such is refused in whole or in part, the allowance could be used. Any allowance not used during any given fiscal year would not be carried over without permission of the Chief Judge.

In its written brief, the Judges stated:

There is a regular education budget administered by the Chief Judge, in the amount of \$40,000.00 for 2005/06 and for 2006/07 in the amount of \$53,278. The increase in the 06/07 budget is solely to pay the appropriate provincial levy to the National Judicial Institute. We are seeking this improvement in contemplation that the regular budget will remain. That budget will cover fixed and recurring costs such as the Court's three annual court-wide education seminars, one in-house mini seminar for ten judges, and group computer training. Accordingly, the \$2,500 per judge is intended to be in addition to the regular budget to allow judges to attend conferences in keeping with appropriate individual judicial education plans. The court's regular budget has only been able to provide sporadic and minimal funds towards such conferences in the past.

The \$2,500 represents the approximate cost for a judge to attend one out-of-province conference per year. Some judges would take advantage of the opportunity in certain years while others, for various reasons, may not. Only by providing the proposed educational allowance in the amount of \$2,500 can there be any assurance that Manitoba judges will be afforded the opportunity to access these conferences. The proposal is deliberately modest, yet realistic. A lesser allowance than \$2,500 would frustrate the goal of the proposal, because it is simply not realistic to attend an out-of-province conference for a sum less than \$2,500, given the registration, air, hotel and meal costs.

The Judges argued judicial education is in the public interest. Other provinces spend more on education than Manitoba. In New Brunswick, Nova Scotia and Saskatchewan, the budgets are approximately double that of Manitoba. It is a career long process and there is a need to remain current. The current budget is marginally adequate for core programs only. High quality education is available from a variety of important programs available to the judiciary across Canada, and is not being accessed. There is no point in Judges making plans if there is no money.

The Province did not question the importance of education for judges, but stated that judges should be making education plans. Otherwise, decisions to attend conferences are made ad hoc and this is not a prudent use of resources. The Province is not satisfied that there is sufficient evidence to establish the need for every single judge to be given an allowance. The Province submitted that anything recommended by the JCC should be married to a proper administrative system so future JCCs can evaluate the effectiveness of the system.

Recommendation on Education Allowance

Section 11.1(3)(b) of the *Act* provides that the JCC has jurisdiction to make recommendations in respect of benefits, including "travel expenses and allowance". The education allowance falls under this category.

While both parties are agreed that education is important, they are at odds over the amounts to be provided and the methodology of administering the program. The Province argues that there should be an evidentiary basis to establish a need and then the Chief Judge can address it. If there is a deficiency, then it can be dealt with at that time.

The Judges maintain that there is a deficiency now and it is in the public interest to make changes. Judges are required to keep up with changes in the law and be provided with means to attend conferences.

Based on the balance of evidence, we are satisfied that the current budget of \$40,000.00 per annum, plus the allowance for membership in the National Judicial Institute, allows the Province to deal with core internal programs only. It is not adequate to allow judges to attend outside conferences.

A province like Manitoba can ensure that its Judges can take advantages of programs operated by the well funded National Judicial Institute, whose program is impressive in its breadth and would be of considerable benefit to Manitoba judges. There are other valuable programs such as the criminal law program operated by the Federation of Law Societies. These outside programs cannot be duplicated by Manitoba.

Also, we are satisfied Manitoba lags behind funding allocated in comparable provinces where the budgets are approximately \$3,000.00 per judge which is

in excess of the approximate \$1,300.00 per judge in Manitoba. We do not believe that this is an expense that should be borne by the Judges out of their salary as this is not the practice elsewhere.

We are sensitive to the Province's expressed concern that it is essential for there to be accountability and a monitoring of each judge's educational plans. However, we believe that the Judges' proposal provides for such a safeguard.

Therefore, we recommend that those who are Judges effective the date of implementation of this Report be provided with an educational allowance of \$2,500.00. This allowance is to be used for attendance at seminars or conferences only as approved by the Chief Judge. Those judges seeking to use the allowance would be obliged to request funding through the regular education budget first, and if such is refused in whole or part, the allowance could be used. Any allowance not used during any given fiscal year could not be carried over.

10.2 Health and Dental Benefits

The Judges proposed a number of changes to the above benefits, and the Province indicated that they were not opposed to these changes.

Recommendation on Health and Dental Benefits

We therefore recommend changes be made in these areas (all to be effective on implementation), which include:

- (1) Partial funding of the Prescription Drug Plan by the Province to a level comparable to the funding it provides to the Plan under the 2003-2006 GEMA with the MGEU;
- (2) Improvements to the Dental Plan consistent with those negotiated between the Province and the MGEU in the 2003-2006 GEMA;
- (3) Extension of Health Benefits, including chiropractic coverage (\$350.00 annual maximum), massage therapy (\$350.00 annual maximum), naturopathy (\$350.00 annual maximum), speech therapy (\$350.00 annual maximum), foot orthotics (\$200.00 annual maximum), hearing aid coverage (\$300.00 maximum per person per 5 year period), provided these changes are acceptable to the plan carrier, the premiums are confirmed by the carrier and that they are paid for by the Judges.
- (4) Life and Dependents Insurance

(i) Age-Related Reductions to Life Insurance Coverage

Those Judges who reached age 56, 66 or 70 before May 5, 2004 be restored to the appropriate amount of insurance (100%, 75%, 62.5% as the case may be) until they reach the age when the first or next reduction occurs. This restoration is to be effective within 60 days following the date the recommendation is accepted by the Legislature. It is not to be retroactive;

(ii) Residual Amount should be Increased

The residual amount available to Judges at age 75 will be increased from \$1,500.00 to \$4,500.00;

(iii) Cost of Life Insurance

There was some question as to the amount of premiums paid by the Judges compared to other plan members. If there is an inequity (and we were not provided up to date information), these adjustments should be made;

(iv) Dependents' Insurance

Dependents' insurance be increased from \$15,000.00 to

\$17,500.00 for a spouse and \$3,500.00 for each eligible child, conditional on these changes being acceptable to the plan carrier within 60 days of the date on which this recommendation is accepted by the Legislature;

(v) Northern Allowance

The northern allowance for judges situated in Thompson and The Pas be consistent with the Remoteness Allowance rate received by members of the Manitoba Government Employees' Union for the duration of each of fiscal years commencing April 1, 2005, April 1, 2006 and April 1, 2007. This recommendation should be effective April 1, 2005.

(vi) National Judicial Counselling

That Government pay the annual fees to enroll each Provincial Court Judge in the National Judicial Counselling Program. The current annual fee per judge is \$50.00. This recommendation should apply to all who were Judges as at April 1, 2005.

10.3 Chief Judge and Associate Chief Judge Differentials

The Judges requested the following:

(i) That the Chief Judge and two Associate Chief Judges should receive an increased salary differential effective April 1, 2005 such that:

- The Chief Judge earns 10% more than puisne judges; and
- The Associate Chief Judges earn 5% more than puisne judges.

(ii) That the Chief Judge and Associate Chief Judges be entitled to accumulate pensionable service at an increased rate proportionate to their higher salary during the term for which they occupy the office. For those in the positions currently, the increased rate should apply to all years of their respective terms.

The rationale for the Judges' request is that the lump sum differential has been in place for approximately 20 years. With the changes in salary over time, this differential has moved from a 13.9% differential in 1985 to 6.2% at present. The salary differential should not decrease in proportion each year and should fairly compensate the Judges for the extra work they do.

The request for an increased pension accrual rate was reviewed in the portion of this report dealing with the overall pension request changes by the Judges.

The Province rejected the Judges' proposal. They submitted that the current remuneration structure provides for a reasonable differential. Furthermore,

the Province disputed that the Chief Judge and Associate Chief Judge received a \$10,000.00 and \$3,000.00 differential for 20 years. In fact, 1998 was the first year that there was a \$10,000.00 and \$3,000.00 differential.

In addition, the Province noted that only Quebec and Newfoundland have a percentage difference (12% and 6% respectively), and the rest of the provinces have a similar system to Manitoba.

Recommendation on Chief Judge and Associate Chief Judge Differentials

We see no reason to recommend changes to the present system. In our view, the present level of compensation provides a fair and reasonable differential and is in line with other similar jurisdictions.

10.4 Costs

Section 11.1(32) of the *Act* provides that Judges are entitled to costs prescribed in the regulations regarding their participation in the compensation committee process. The Lieutenant Governor in Council may make regulations prescribing costs and setting a limit on them.

Regulations have not been made. As a result prior JCCs have recommended costs. JCC #3 set a cap of \$15,000.00. JCCs #4 and #5 recommended that the Province pay 75% of the Judges' costs and fees to a maximum aggregate

payment of \$30,000.00.

The Judges' submit that the JCC should review the accounts in coming to a determination of what recommendation is appropriate regarding costs. They suggest that the Province pay the costs on a solicitor and client basis. Alternately, they state that should the JCC wish to set a cap on costs, the cap be set after a review.

The Judges also presented detailed information regarding the practice of paying costs in other jurisdictions. It varies from province to province, but it was pointed out that the majority are contributing in excess of \$30,000.00.

The Province rejected the notion that the JCC should review the costs. This proposal had been rejected by JCC #4. It could lead to a JCC questioning certain costs and might place a JCC in an untenable position. The Province stated that the recommendations of JCC #4 and #5 were a rational approach to dealing with this issue.

Recommendation on Costs

The submissions of both parties were of great assistance in our task. We received extensive materials and submissions from the parties. We are cognizant of the time and effort that go into the preparation of these submissions.

As stated in the past, the process exists to ensure an independent and sound judiciary.

We do not believe that this committee should review the accounts for the reasons outlined by JCC #4.

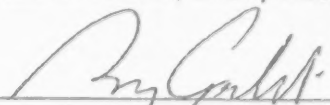
This year we heard expert actuarial evidence regarding pensions and other testimony with respect to educational allowances. In addition, the figure of \$30,000.00 has been in place for a number of years.

Accordingly, an increase is warranted and we recommend that the Province pay 75% of the Judges' costs and fees to a maximum aggregate payment by the Province of \$35,000.00.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Winnipeg, in Manitoba, this ^{20th} day of June, 2006.


Michael D. Werier, Chairperson


Barry L. Gorlick, Q.C.

**JUDICIAL COMPENSATION COMMITTEE
REASONS FOR RECOMMENDATIONS
VICTOR HAROLD SCHROEDER, MEMBER**

There are several areas where I respectfully disagree with concepts contained in the committee report but, because I support all of its recommendations, which have been arrived at after substantial effort I simply note for the record that my support of the committee's conclusions does not mean I support all the reasons.

There is, however, one issue I believe needs to be drawn to the attention of the legislature and that has to do with the changes occurring in the provinces which make up our legislated three province average. I agree with the report that we should give extremely close consideration to the salaries of judges in those three provinces.

That is so because of our governing legislation as well as the reports of prior committees. The report elsewhere notes that our governing legislation requires us to go further and also consider the differences between Manitoba and the other jurisdictions.

Circumstances in all three provinces in the average have evolved significantly since they were first chosen, making them less relevant to our circumstances today than before, other than for the legislated requirement. Of the three, Saskatchewan's circumstances have changed the most dramatically, including economic, legislative

and jurisdictional changes.

On the economic front, at previous hearings Saskatchewan was an equalization recipient in similar financial circumstances to those facing Manitoba. Resource revenue (especially oil, gas and uranium) has skyrocketed, making it relatively wealthier. This has resulted in very large salary increases to its senior civil service, a factor taken specifically into account by its JCC when it awarded the recent similar very substantial increase to its provincial court judges. Subject to my final comments I see no reason why the same comparisons to provincially paid staff are inappropriate or not relevant in Manitoba where increases to senior staff have been modest.

The federal process similarly makes very specific use of the salaries of senior federal civil servants/crown employees as comparators.

I use the word "awarded" with respect to the Saskatchewan JCC because the legislative front in Saskatchewan has changed over time. Unlike Manitoba's JCC, which only makes a recommendation where, as this year, it is above the three province average, their award is now binding on Saskatchewan so long as it does not exceed the Canadian average. Lastly, the jurisdiction of Saskatchewan judges has recently been considerably expanded, presumably creating a greater work load.

So clearly we do not look as similar to Saskatchewan as we did at our last JCC and

our joint recommendation implicitly takes this into account.

Nova Scotia continues to be a comparator similar to the comparator it was previously but it has evolved somewhat on the legislative front since it was considered as a comparator by an early JCC. It is specifically mandated to take federal judges' salaries into account. (Needless to say, the salaries of provincial judges are of no interest to federal JCCs).

Further, Nova Scotia's reports are now awards which must be implemented by government. There is no constraint turning it into a "recommendation" if it exceeds a legislatively defined average of some type. It must be implemented.

The combined effect of these provisions together with the rebalancing performed last year by the Supreme Court for those provinces where the legislature retains the right to make the final determination unarguably tends to skew awards up in Nova Scotia above where its economic weight in Canada might place them.

Lastly, while New Brunswick remains economically a comparator similar to the comparator it was in the past, it is currently public policy to maintain judicial salaries with appropriate cost of living adjustments until such time as conditions are demonstrated to have changed. This policy, maintained successfully through to the Supreme Court in the recent reference, will for the time being skew increases down somewhat.

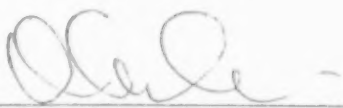
In short, it appears that, assuming all provinces were up to date at a particular time, all other things being equal I would expect salaries here to exceed those in New Brunswick and trail those in Saskatchewan (mostly for economic reasons but also for jurisdictional and legislative reasons) and Nova Scotia (not for economic reasons but rather for legislative reasons).

At the same time, salaries of other provincial court judges are, pursuant to our governing legislation, to be taken into account as one of a number of factors. Just as differing criteria in different provinces create differing results for judges' compensation, differing criteria for judges' compensation from those for other public servants within a province will ordinarily result in different results for judges than for others.

Again, I believe that the recommendations, which would provide modestly greater increases to our judiciary than to most in the provincial public sector, reflect the fact that significant weight must be placed on the other criteria in the legislation but that judicial salaries in other jurisdictions in Canada must also be reflected in the final recommendations.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Winnipeg, in Manitoba, this 20th day of June, 2006.


VICTOR H. SCHROEDER, Q.C.